

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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RICHARD C. VICKERMAN,

Plaintiff,

vs.

THE DEPT. OF HOUSING AND URBAN
DEVELOPMENT (HUD) & ACCESSIBLE
SPACE INC. (ASI) dba. THE SANDY
ROBINSON APTS. (SRA) & THE CITY OF
LAS VEGAS BUILDING DEPT. (CLB) &
DOES 1 through 40,

Defendants.

03:03-CV-0222-LRH (VPC)

ORDER

Presently before this Court is Plaintiff Richard Vickerman's renewed motion to amend (#85¹). Defendant Department of Housing and Urban Development ("HUD") has opposed the motion (#86) as has Defendant Accessible Space, Inc. ("ASI") (#87). Plaintiff has filed no reply.

The current motion arises out of this Court's denial in part (#83) of Plaintiff's previous motion to amend (#77) his complaint to add claims involving violations of Plaintiff's equal protection and due process rights against ASI. The Court denied without prejudice the previous motion on the ground that Plaintiff had not included any allegations of state action and therefore insufficient evidence existed to provide ASI with fair notice of the claims alleged against it. The Court ordered Plaintiff to add specificity to his claims if he chose to renew his motion to amend.

Plaintiff wasted no time in filing the present renewed motion to amend, once again claiming that ASI had violated his due process and equal protection rights. Plaintiff's renewed

¹ References to (# XX) refer to the Court's docket.

1 motion to amend contains only one factual statement the Court understands to allege state action:
2 that ASI is federally funded. The two viable theories presented by Plaintiff are, first, that the
3 entrance into his apartment was done by employees of a federally funded entity and therefore
4 state action exists and, second, that his lease was terminated by a federally funded entity based on
5 an improper motive. The remainder of the motion simply recounts the events that led to
6 Plaintiff's lawsuit.

7 Leave to amend should be freely granted when justice so requires. Fed. R. Civ. P. 15(a).
8 However, the Ninth Circuit has outlined four reasons why a Court may refuse to grant leave to
9 amend: (1) undue delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the
10 opposing party. *Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 1997). ASI has challenged
11 Plaintiff's request to amend his complaint on the ground of futility. Thus, the Court will look at
12 each potential claim sought to be added by Plaintiff to determine if leave to amend should be
13 granted.

14 *1. Equal Protection Violation Based on Search*

15 In the Court's initial order (#72) concerning ASI's motion for summary judgment, the
16 Court considered whether Plaintiff had properly stated a cause of action under the Equal
17 Protection clause for searching disabled residents more often than non-disabled residents. The
18 Court concluded that Plaintiff had not stated such a claim and had provided no allegations of
19 other grounds for equal protection violations. Plaintiff has added nothing by way of additional
20 theories for finding an equal protection violation. As such, an amendment to include an equal
21 protection violation based on the search of Plaintiff's apartment would be futile as the Court has
22 ruled on that issue previously and Plaintiff has merely recited the facts in different words without
23 providing any suggestion that alternative grounds exist for an equal protection claim based on the
24 search. *See DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 188 (9th Cir. 1987) (citing to
25 *Wakeen v. Hoffman House, Inc.*, 724 F.2d 1238, 1244 (7th Cir. 1983) for the proposition that it is
26 "not an abuse of discretion to refuse a request to amend when the proffered amendment merely
27 restates the same facts using different language, or reasserts a claim previously determined").

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1 2. *Substantive Due Process Violation Based on Search*

2 Plaintiff also seeks to amend to add a claim that his Fifth Amendment right to substantive
3 due process was violated by the search of his apartment. The Court has already found, in a
4 previous order (#72), that the search could be considered to constitute state action, and therefore
5 allowed a claim under the Fourth Amendment to proceed. The United States Supreme Court has
6 held that where “a particular Amendment provides an explicit textual source of constitutional
7 protection against a particular sort of government behavior, that Amendment, not the more
8 generalized notion of substantive due process must be the guide for analyzing these claims.”
9 *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (citing *Graham v. Connor*, 490 U.S. 386 (1989))
10 (internal quotations omitted). Thus, the Court concludes that an amendment based on a
11 substantive due process violation predicated on the search of Plaintiff’s apartment would be
12 futile, as the claim is already covered by the Fourth Amendment claim the Court has already
13 allowed to proceed.

14 3. *Claims Based on Lease Termination*

15 Plaintiff has also attempted to allege violations of his Fifth and Fourteenth Amendment
16 claims based on the termination of his rental agreement with ASI. To allow for an amendment to
17 the complaint, there must be some colorable state action on which Plaintiff relies. The Court
18 first notes the difference between this situation and the factual scenario allowing the Fourth
19 Amendment claim to proceed. Regarding the Fourth Amendment claim, the search of Plaintiff’s
20 apartment was based on a federal requirement that compliance reviews be complete when HUD
21 funding has been granted. ASI was required to conduct the search and HUD employees
22 accompanied ASI employees in effectuating the search. Such is not the situation here, Plaintiff’s
23 rental agreement was terminated by ASI and ASI alone, under no government coercion. Thus, to
24 proceed, Plaintiff must show some other avenue by which state action can be implied.

25 As noted above, the sole fact presented to this Court is the federal funding received by
26 ASI when the apartment complex was constructed. As noted in the Court’s previous summary
27 judgment order (#77), neither financial support, or extensive control through regulations, are
28 enough, alone to warrant a finding of state action. *See, e.g., Gallman v. Pierce*, 639 F.Supp. 472,

1 481 (N.D. Cal. 1986). Rather, state action only exists if the government is actually responsible
2 for the challenged conduct, or if there has been significant state encouragement of the conduct.
3 *Id.* Plaintiff has been unable to bring forth factual allegations suggesting that his rental
4 agreement was terminated by state action that amounted to more than the initial funding of the
5 ASI apartment complex. Further, the Court, in reviewing the record, can conceive of no factual
6 scenario that could be proven by Plaintiff which would allow for a conclusion that the rental
7 agreement termination was instituted through state action. As such, any amendment to the
8 complaint would be futile and is denied.

9 4. *Constitutional Claims Against HUD*

10 The Court also denies any portion of Plaintiff's motion to amend which seeks to add Fifth
11 or Fifteenth Amendment claims against HUD. The Court has previously ruled that such claims
12 are barred by sovereign immunity (#77) and has not wavered from that position (#83). The
13 Court's previous invitation to file an renewed motion to amend was not intended to allow for
14 these claims, already dismissed, to be revived. As such, the Court notes HUD's objections to the
15 renewed motion to amend and denies any amendments which would add constitutional claims
16 against HUD.

17 The Court, thus, denies Plaintiff's renewed motion to amend as any amendment proposed
18 would be futile or has already been dismissed by the Court. The Court notes, however, that
19 Plaintiff has yet to file the amended complaint allowed by the Court's first order granting an
20 amendment to add a claim under the Administrative Procedures Act (#83). Plaintiff is therefore
21 directed to file his amended complaint so that the Court may proceed with this matter.

22 IT IS HEREBY ORDERED.

23 DATED this 19th day of December, 2005.

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LARRY R. HICKS
27 United States District Judge
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